IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO (Ord.) No.220 of 2005.

Judgment reserved on:1.5.2006.

Date of decision: May 5, 2006.

---

Sant Ram and another .....Appellants

-Versus-

Amin Chand and others ....Respondents

---

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

Whether approved for reporting?

For the Appellants: Mr.R.K.Gautam, Sr.Advocate with
Mr.Naveen K.Bhardwaj, Advocate.

For Respondents : Nemo.

---

**Deepak Gupta, J.**

This appeal is directed against the judgment of the learned Addl.District Judge, Kangra at Dharamshala whereby he has set-aside the judgment and decree passed by learned Sub Judge Ist Class (II), Kangra and has remanded the case to the trial Court.

The brief facts relevant for decision of the case are that according to the plaintiffs the suit land is jointly held by both the parties and the order of partition passed by the Assistant Collector Ist Grade, Kangra dated 21.6.1990 which was upheld by the Collector as well as by the Divisional Commissioner, Kangra is illegal and liable to be set-aside. It was prayed that the parties are in the joint possession and in the alternative possession was prayed for.

According to the plaintiffs, defendant No.2 had sold part of the suit land on the basis of wrong and false revenue entries to defendant No.1. According to the plaintiffs, the defendant No.2 had no right or share in the property and the entries showing her to be co-owner were wrong, illegal and null and void. One of the main contention raised was that Rasila husband of defendant No.2 was not the son of Smt.Roopa and that Rasila in collusion with revenue authorities had wrongly got his name entered in the revenue record. On this basis it was averred that neither Rasila nor his widow had any right whatsoever in the property. Another contention of the plaintiffs was that the suit property was in fact abadi land and was initially recorded as such, however, during settlement operation it was wrongly entered as banjar kadeem without any order by a competent authority.

The defendants 1&2 contested the suit on various grounds. It was stated that Rasila was in fact the son of Smt.Roopa and further it was stated that the land was rightly entered as banjar kadeem. According to the defendants the land was not abadi land and, therefore, submitted that the orders passed in partition proceedings are correct.

On the basis of the pleadings the trial Court framed the following issues:

> "1.Whether the order dated 21.6.1990 passed by A.C. Ist Grade, Kangra in a partition case titled as 'Sant Ram vs. Amin Chand' and subsequently upheld by Collector and then by the Divisional Commissioner is wrong, null and void, as alleged? …OPP.
> 2.Whether the suit land is joint between the parties, as alleged, if so its effect?…OPP.

3.Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction and in the alternative for the possession of suit land?…OPP.

4.Whether the plaintiffs, in alternative, are entitled to the joint possession of the suit land?..OPP.

5.Whether the suit is not maintainable in the present form?…OPD

6.Whether the plaintiffs are estopped by their act, conduct from filing the suit?…OPD.

7.Whether the suit is barred by limitation?..OPD

8.Whether the plaintiffs have suppressed the material facts from the court, as alleged? If so, its effect? …OPD.

9.Whether the plaintiffs have cause of action and locus-standi to sue?…OPP.

10.Relief."

The trial Court on the basis of the evidence led by the parties and the arguments led before it decided the case against the plaintiffs and in favour of the defendants. The suit was dismissed. The plaintiffs filed an appeal and the learned lower Appellate Court vide order dated 26th February, 2005 set-aside the judgment and decree of the trial Court and has remanded the case back to the trial Court after framing the following additional issues:

"1.Whether Rasila husband of defendant No.2 Smt.Roshni Devi was neither the son of Smt.Rupa nor from the loins of Hazri and the revenue entries are wrong?…OPP.

2.Whether the suit land was Abadi and could not be partitioned by revenue officers?…OPP.

3.Whether the plaintiff and proforma defendants No.3 and 4 are owner of the suit land and their Abadi still exists in the suit land? …OPP.

4.Whether the defendant is bonafide purchaser without notice and for consideration?…OPD.

Thereafter, the learned appellate Court set-aside the entire judgment for decision afresh on all the issues including the issues earlier framed in the suit.

I have heard Sh.R.K.Gautam, learned Senior Advocate appearing on behalf of the appellants-defendants 1&2. Though notices were issued a number of times to the plaintiffs-respondents and also their counsel and they have been duly served but they have not put in appearance and therefore the appeal is being decided in their absence. Mr.Gautam has submitted that the parties were well aware of their case and had led evidence on all aspects. He states that issue No.1 as originally framed was a omnibus issue which covered issues No.1&2 as freshly framed by the learned lower Appellate Court. He further submits that the issue No.3 now framed is totally covered by issue No.2 as originally framed. As far as issue No.4 is concerned he submits that the defendants have never pressed for the framing of this issue.

It is well settled law that merely because of non-framing of issues the judgment of a Court should not be set-aside. If the parties are aware of the dispute and have led evidence to prove their respective case then merely because of the fact that an issue has not been framed is not a sufficient ground to set-aside the judgment. Reference in this behalf may be made to a judgment of the Apex Court in

**P.Purushottam Reddy and Another vs.Pratap Steels Ltd.** (2002) 2 SCC686 wherein it has been held as follows:

> "11……It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16 (c ) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not --- in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision."

The Apex Court in **Sayeda Akhtar vs.Abdul Ahad, (**2003) 7 SCC 52, held as follows:

> "10.Furthermore, as indicated hereinbefore, the plaintiff sought for a decree for eviction against the defendant also on the ground of commission of nuisance. It is true that the trial court did not frame any specific issue therefore but a bare perusal of the judgment passed by the learned trial court will clearly demonstrate that the parties were aware thereabout and not only adduced evidence in that behalf but also advanced their respective submissions in relation thereto…."

In fact, in my opinion the fresh issues were covered by the issues earlier framed and the evidence had already been led on the points in dispute. Even in case the learned lower appellate Court felt that new issues could have been framed because of the fact that the parties had

led evidence with regard to all issues including the freshly framed issues it should have decided the same itself.

In my opinion, the contention of Mr.Gautam is correct that the issues previously framed covered the issues Nos.1 to 3 now framed by the learned lower Appellate Court. However, even if the other view is taken then also it is clear that the parties had led evidence with regard to the issues now framed. The plaintiffs were well aware that one of the main points involved in the suit was whether Rasila was the son of Smt.Roopa. They led evidence in this behalf. They also led evidence to prove that the suit property was abadi and, therefore, could not be partitioned. Evidence was also led to prove that the property still remained joint. This is apparent from the judgment of the trial Court. It would be pertinent to quote para 6 of the trial Court judgment:

> "6.The onus of this issue is upon the plaintiffs. In order to prove his case plaintiff Saran Dass stepped into the witness box as PW-1 and stated that plaintiffs are owners-in-possession of the suit land and it is abadi in nature. Defendant No.2 has wrongly sold this land. Rasila never occupied the suit land as owner and he was not son of Smt.Roopan. Revenue entries in the name of Sh.Rasila and Roopan are wrong. The defendant No.1 never occupied the suit land. The defendant No.1 has no right to get the suit land partitioned. In cross-examination, plaintiff could not tell when the sale deed was executed. Hajari was Roopan's husband. It is stated that plaintiffs preferred appeal against partition order. It is denied that defendant No.2 was also owner of the suit land and Rasila was husband of defendant No.2. Plaintiff could not tell qua the Field No. of the land over which his cowshed is existing."

It is clear that the plaintiffs had led evidence on all the aspects. The plaintiffs in addition to Saran Dass had examined one other witness who deposed in a similar manner. The plaintiffs also led documentary evidence including jamabandies and copies of pedigree table to show the relationship between Roopa and Rasila. The learned trial Court has decided both these questions i.e. the relationship between Roopa and Rasila as well as the question whether the land in question was gair-mumkin abadi or the banjar kadeem. I am purposely not going into the merits of the decision of the trial Court since in my opinion this is a matter for the lower Appellate Court to decide. Suffice to say that a reading of the trial Court judgment clearly shows that the parties were not only well aware of the disputes but had also led sufficient evidence in this regard. The order of the lower Appellate Court setting aside the judgment of the trial Court on this ground is totally illegal.

This Court has repeatedly held that a case should not be remanded unless there are cogent reasons for doing the same. In the present case the lower Appellate Court seems to have swayed by the arguments of the plaintiffs and has not gone through the record which clearly shows that the plaintiffs had led evidence on the issues now sought to be framed. As far as issue No.3 framed by the lower Appellate Court is concerned, in my opinion, this was a totally superfluous issue and was covered by issue No.2 framed earlier.

In view of the above discussion, the order of the learned lower Appellate Court is set-aside and the case is sent back to it to decide the same on merits. The lower Appellate Court shall re-admit the appeal to its original number and shall decide the same strictly on merits. As far

as issue No.3 is concerned I have clearly held that it is totally superfluous. The appellants do not claim that issue No.4 be framed. As far as issues 1&2 are concerned, as observed above, they are more or less covered by issue No.1 framed by the trial Court but even if the learned lower Appellate Court is of the opinion that framing of a specific issue can help it to decide the same in a better fashion it can re-frame the issues and decide the same on the basis of the evidence already on record. No costs.

May 5, 2006.
PV

**( Deepak Gupta ),**
**Judge**